Filed 10/1/03 Downey Land Ltd. v. Sup. Ct. CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| DOWNEY LAND LIMITED,<br><br>Petitioner,<br><br>v.<br><br>SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,<br><br>Respondent;<br><br>THE JOHN M. PROBANDT COMPANY, LLC et al.,<br><br>Real Parties in Interest. | B165083<br><br>(Los Angeles County Super. Ct. No. VC036809) |

ORIGINAL PROCEEDINGS in mandate. William J. Birney, Jr., Judge. Petition denied.

Jeffrey B. Singer for Petitioner.

No appearance for Respondent.

Gershfeld & Voronin and Yanna K. Gershfeld; Law Office of Lawrence P. House and Lawrence P. House for Real Parties in Interest.

## INTRODUCTION

In this petition for writ of mandate, petitioner Downey Land Limited, a California limited partnership (Downey Land), contends the trial court erred in setting aside a default judgment and the underlying defaults against respondents Walter M. Glass (Glass) and Imperial Fitness Health Club, LLC (Imperial), previously known as the John M. Probandt Company, LLC (Probandt Company).[1]

We deny the petition for writ of mandate.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Downey Land owned property located at 9440 East Imperial Highway, Downey, California. In August 1995, Downey Land leased the property to Weber Enterprises, Inc. (Weber) for use as a health club.

In 1999, Weber sold its health club business to Imperial. Weber obtained written consent from Downey Land to assign its lease to Imperial. On May 13, 1999, the lease was assigned. The assignment was executed by Imperial's four principals on behalf of the company.

On May 13, 1999, Imperial's four principals John M. Probandt (Probandt), John Raynor (Raynor), Timothy J. White (White), and Glass executed a personal guaranty of the assignment of lease.

---

[1] Imperial appears in these proceedings as the successor-in-interest to Probandt Company. In the trial court, Downey Land contended that Imperial was an interloper as the default and default judgment had been entered against the Probandt Company for its breach of contract and Imperial had not demonstrated its right to act on behalf of the Probandt Company. In these writ proceedings, Downey Land has waived this issue. In its reply, Downey Land has conceded that for purposes of this proceeding, Imperial became the successor-in-interest of the Probandt Company. For simplicity, in discussing the facts, we treat the actions of the Probandt Company as if they were done by Imperial.

In late 2001 and early 2002, the business closed and Imperial vacated the premises.

2. *Procedure.*

a. *The complaint and default judgments.*

On April 12, 2002, Downey Land filed a lawsuit against Weber and Imperial for breach of contract, and against Probandt, Raynor, White, and Glass on the personal guaranty. With regard to Imperial, Downey Land alleged in the body of the complaint that it sought damages "in excess of $75,000, with the amount increasing per month, through the expiration of the term of the agreements, less any amounts which [Downey Land] can mitigate. [¶] [Downey Land also sought] damages in an amount to be proven at time of trial for [] waste. " With regard to Glass and the other guarantors, the body of the complaint sought damages "in an amount to be proven at time of trial."

The prayer of the complaint sought general, compensatory damages, in an amount to be proven at time of trial; interest on the unpaid rent; late charges; attorneys fees; costs; and for such other relief as the court may deem just and proper.[2]

White and Raynor answered the complaint. Glass and Imperial represent to this court that Probandt was dismissed.

On June 18, 2002, Downey Land filed a request for entry of Imperial's default. The request for default did not specify the amount of the judgment to be entered. The clerk of the court entered default against Imperial on June 18, 2002.

---

[2] In the prayer, the complaint stated: "WHEREFORE, [Downey Land] prays for judgment against Defendants as follows: [¶] 1. For general, compensatory damages, pursuant to Civil Code section 1951.2, [remedy of lessor,] in an amount to be proven at time of trial; [¶] 2. Interest on the unpaid rent from the date due; [¶] 3. Late charges; [¶] 4. For reasonable attorneys fees incurred herein; [¶] 5. For costs of suit; and [¶] 6. For such other and further relief as the court may deem just and proper."

On June 18, 2002, Downey Land filed a request for entry of Glass's default. The request for default did not specify the amount of the judgment to be entered. The clerk of the court entered default against Glass on June 18, 2002.

It appears Weber's default was also entered.

On August 1, 2002, a hearing was held during which Downey Land conducted a default prove-up against Imperial, Glass, and Weber.

After considering the evidence, testimony, and argument of counsel, on August 5, 2002, default judgment was entered against Imperial, Glass, and Weber in the total sum of $798,975.21, principal, attorney fees, and costs.

b. *Setting aside the default and default judgment.*

On December 18, 2002, Imperial and Glass filed a motion to set aside entry of defaults and default judgment entered against them. Imperial and Glass contended relief was warranted because there had been mistake, inadvertence, surprise, or excusable neglect. (Code Civ. Proc., § 473, subd. (b).)[3] Imperial and Glass also argued that the default judgment was void as beyond the trial court's jurisdiction because the complaint had not set forth the amount demanded. (Code Civ. Proc., §§ 425.10, 580.) Lastly, the motion argued that, consistent with the one judgment rule, the default judgment should be set aside because such judgment could not be entered without dismissing the remaining defendants. (Code Civ. Proc., § 579; Cal. Rules of Court, rule 388(a)(7).

In opposition to the motion, Downey Land contended, among other contentions, that: (1) the motion was untimely pursuant to Code of Civil Procedure section 473, subdivision (b) because it was filed 183 days after the defaults had been entered; and (2) the allegations in the complaint sufficiently apprised Imperial and Glass of the amount of damages sought because the sums owed could be ascertained from the lease

---

[3] The motion was *not* brought pursuant to the attorney fault provision of Code of Civil Procedure section 473. Imperial and Glass did *not* request the trial court exercise its inherent authority to grant relief, nor did they argue extrinsic fraud or mistake warranted relief.

and Imperial and Glass "knew full well what their exposure was for unpaid rent and interest . . . ." According to Downey Land, Imperial, and Glass would have known that their exposure for unpaid rent and interest was for $535,146.39.

On January 17, 2003, the trial court issued an order granting the relief motion and vacating the defaults and default judgment entered against Glass and Imperial. Downey Land appealed from the January 17, 2003, order.

c. *The appeal and our order directing the matter be heard as a writ petition.*

Imperial and Glass filed in this court a motion to dismiss the appeal. We directed that the notice of appeal be considered as a petition for writ of mandate and issued an order to show cause.[4]

d. *Additional trial court proceedings.*

In the trial court, Glass and Imperial moved for leave to file a cross-complaint. On March 12, 2003, the motion was granted and the cross-complaint was deemed filed and served as of that date. Downey Land apparently has answered the cross-complaint. Downey Land states that the parties are presently engaged in discovery. Downey Land has represented to this court that Glass and Imperial have filed a motion for summary adjudication, which is set to be heard on October 22, 2003.

In late 2002, Downey Land filed a motion for summary judgment against White and Raynor requesting judgment in the sum of $771,368.75, consisting of "unpaid rent earned up to the time of termination of the tenancy, plus interest[; plus] unpaid rent after date of termination to time of award . . . (after giving credit for mitigated offset) plus interest[; plus] future rent (after giving credit for mitigated offset) discounted to present

---

[4] In so ordering, we stated: "It appears . . . that the sole issue raised by the instant appeal is whether the trial court's order of January 17, 2003 vacating the default judgment entered [on] August 5, 2002 against Glass [and Imperial] is error. It further appears that there are other defendants remaining in the action pending in the Superior Court unaffected by the aforesaid ruling as to whom a final judgment has not as yet been entered. It therefore appears that the interests of justice will best be served by resolving the sole issue raised by this appeal on an expedited basis."

value[; plus] other consequential damages from the breach[.]" On December 24, 2002, the motion was granted, but the trial court awarded only $535,146.39. The trial court ruled Downey Land was not entitled to consequential damages. The trial court held that the liability of White and Raynor was established through requests for admissions. The trial court held that the defense that the lease assignment was voidable had not been raised in the answers and was without merit. Downey Land states that although the summary judgment motion was granted, the trial court declined to enter judgment against White and Raynor.

When the trial court set aside the defaults and default judgment entered against Imperial and Glass, it did not set aside the default or default judgment entered against Weber. On September 18, 2003, while these proceedings were pending, the trial court set aside the August 5, 2002 default judgment entered against Weber.

e. *The petition for writ of mandate.*

Downey Land has filed a petition for writ of mandate seeking to reinstate the defaults and default judgment entered against Glass and Imperial for the lesser amount of $535,146.39, plus attorney fees, and costs. Downey Land also requests that we order the cross-complaint be stricken and award it attorney fees and costs on appeal.

Imperial and Glass have filed an opposition to the writ petition; Downey Land has filed a reply; and oral argument has been held.

## DISCUSSION

*There was a lack of due process, and thus, the defaults and the default judgment were properly set aside as void.*

Downey Land contends Glass and Imperial were not denied due process because they were given fair notice of the amount sought against them. This contention is not persuasive.

a. *Notice requirements.*

Before defaults may be entered against them, defendants are entitled to "actual notice of the liability to which he or she may be subjected . . . ." (*Schwab v. Rondel*

*Homes, Inc.* (1991) 53 Cal.3d 428, 435; Code Civ. Proc., § 580.) Defendants must be given "notice of the specific amount of damages demanded. [Citation.]" (*Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1296; see also, Code Civ. Proc., §§ 425.10; 425.11; 585, subds. (a), (b).)

This due process requirement is usually satisfied by the complaint's prayer. However, it may be met by allegations in the complaint. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 829; *Schwab v. Rondel Homes, Inc., supra,* 53 Cal.3d at p. 435.)[5]

The failure to provide this specific notification violates due process and an opportunity to defend. Default judgments entered after a failure to provide this notice are void as trial courts are without jurisdiction to enter them. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166, 1167; *Greenup v. Rodman, supra,* 42 Cal.3d at p. 826; *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493.)

Where a challenged judgment only partially exceeds the court's jurisdiction, a modified judgment may be entered to save that portion which is not void. (*Becker v. S.P.V. Construction Co., supra,* 27 Cal.3d at p. 495.) For example, in *Becker v. S.P.V. Construction Co., supra,* the underlying complaint "sought damages 'in excess of $20,000 . . . or according to proof,' punitive damages of $100,000, and costs." (*Id.* at p. 492.) A default judgment was subsequently entered for $26,457.50 attorney's fees, and costs. (*Ibid*.) The Supreme Court vacated the entire judgment, but instructed the trial court upon remand to "strik[e] the award of damages in excess of $20,000 and any attorney's fees." (*Id.* at p. 495.)

Judgments void on their face, or which require only inspection of the judgment roll or record to show their invalidity, may be set aside any time after entry. (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 19.)

---

**5** In situations in which plaintiffs are prohibited from specifying the damages in the complaint, notice of the amount sought must be provided by a statement of damages. (Code Civ. Proc., §§ 425.10, 425.11; *Cummings Medical Corp. v. Occupational Medical Corp., supra,* 10 Cal.App.4th at p. 1296.)

b. *The complaint did not put Glass on notice of the damages sought against him.*

Here, as to Glass neither the allegations in the complaint nor its prayer alerted Glass as to the amount of damages being sought against him. The complaint simply stated that damages sought were to be "proven at time of trial." The prayer contained no monetary specification, but merely requested certain types of damages, i.e., compensatory, unpaid rent, attorney fees, and costs. Thus, Glass was denied due process because prior to the entry of default, he was not apprised of the damages sought against him.[6] The trial court properly vacated the default and default judgment that had been entered against him.

c. *The complaint did not put Imperial on notice of the damages sought against it.*

With regard to Imperial, the body of the complaint sought damages "in excess of $75,000, with the amount increasing per month, through the expiration of the term of the agreements, less any amounts which [Downey Land] can mitigate. [¶] [Downey Land also sought] damages in an amount to be proven at time of trial for [] waste." The prayer contained no monetary specification, but merely requested certain types of damages, i.e., compensatory, unpaid rent, attorney fees, and costs.

Thus, neither the allegations of the complaint, nor the prayer, provided Imperial with adequate notice of the specific damages being sought against it.

Downey Land argues the lease that was attached to the complaint provided the amount owed, and as a practical matter, landlords cannot state exactly the amount demanded, as the amount increases every day, until judgment is entered. Even if the lease could have provided sufficient notice of the amount owed for rent, the complaint also sought damages for waste. Neither the complaint nor the prayer specified the amount owed for waste.

---

[6] The cause of action stated against Glass and the other guarantors alleged that Downey Land "re-alleges and incorporates herein by reference each and every allegation set forth above . . . ." However, given the form of the complaint, this statement would not have put Glass on notice that the damages against him were "in excess of $75,000."

Downey Land has not argued that, at a minimum, Imperial was put on notice that the sum of $75,000 was being sought. Downey Land has not suggested it was entitled to judgment against Imperial in the sum of $75,000. (Cf. *Becker v. S.P.V. Construction Co., supra,* 27 Cal.3d 489 ["in excess language"].) We note, however, that the language of the complaint before us, states that damages "in excess of $75,000 . . . , less any amounts which [Downey Land] can mitigate."

The trial court did not err in vacating the default and default judgment as to Imperial.

d. *The other arguments presented by Downey Land are not persuasive.*

Downey Land contends that neither Glass nor Imperial were denied due process because Glass and Imperial were in possession of all information required to calculate damages, the lease was attached to the complaint, the lease set forth the amount of rent, and thus, the damages were "objectively calculable, as an arithmetic function from the allegations of the Complaint . . . ." In raising this contention, Downey Land requests that we direct the trial court to enter a new judgment in the sum of $535,146.39, the amount adjudicated as to the amount owed for lost rent and interest in the summary judgment proceedings involving other defendants.[7]

Downey Land relies upon *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157, for this argument. However, *Cassel* does not assist Downey Land.

*Cassel v. Sullivan, Roche & Johnson*, *supra,* 76 Cal.App.4th 1157, involved an action for an accounting in a partnership dissolution case. The complaint by the partner seeking the accounting advised the partnership that he sought a determination of his financial interest in the partnership and that the partnership was in possession of the essential account books and financial information needed to ascertain the value of his

---

[7] In awarding to Downey Land $535,146.39 in the summary judgment proceedings against White and Raynor, the trial court determined it was inappropriate to award consequential damages. It awarded lost rent plus interest, and future rent.

interest. (*Id.* at pp. 1159-1160.) Such interest would be based upon the method of calculation set forth in the partnership agreement. (*Id.* at p. 1163.) After a default prove-up hearing, the partner was awarded $305,690, plus attorney fees. (*Id.* at p. 1160.) That judgment was vacated and a statement of damages was served. Although the matter was called for a default hearing, the trial court permitted both sides to present evidence. Thereafter, a second judgment for the sum of $305,690, plus attorney fees was entered. *Cassel* held that the first judgment should not have been vacated because in an accounting action in which the defendants are in possession of all information "at least equal to (and according to [the complaint], greater than) that possessed by [the plaintiff partner] . . ." (*id.* at p. 1163), the defendant partnership was in "possession of the essential information necessary to calculate their potential exposure." (*Id.* at p. 1164.)

The action before us is not one for an accounting, but one for breach of contract and based upon a guarantee. Further, Downey Land states that the proper amount of the default judgment to be entered is $535,146.39, plus attorney fees, and costs, rather than the $798,975.21, principal, attorney fees, and costs that had been awarded after the default prove-up. This discrepancy demonstrates that the amount sought could not have been ascertained by Imperial and Glass from the information they possessed.

Downey Land apparently recognizes the flaw in its reasoning and concedes that the complaint did not give notice of the "consequential damages (e.g., cost to repair waste committed) . . . ." (See fn. 6.) Downey Land states it is not seeking default judgment for those sums, but asks us to reduce the judgment to the amount that would have been ascertainable by examining the lease. In making this argument, Downey Land borrows thoughts from the cases permitting modification of default judgments to reflect that portion which was not void. (E.g., *Becker v. S.P.V. Construction Co., supra,* 27 Cal.3d at p. 493.) However, those cases are not analogous.

Plaintiffs such as Downey Land may not serve upon defendants a complaint that requests many different types of damages, obtain a default judgment, and when questioned about the amount of the judgment, unilaterally pronounce that notice as to

*some*, but not all of the specified damages was ascertainable from the complaint. Due process requires fair notice of the amount sought. Cases permitting some flexibility in the pleading requirements do so only because the language of the complaint (e.g., *Becker v. S.P.V. Construction Co., supra,* 27 Cal.3d 489) or the circumstances (*Cassel v. Sullivan, Roche & Johnson, supra,* 76 Cal.App.4th 1157) resulted in fair notice to the defendants of the damages sought.

Lastly, Downey Land states that even if the "default judgment was subject to attack and properly set aside, that does not affect the validity of the defaults themselves." Downey Land would cure the notice problem by serving upon Imperial and Glass a statement of damages. However, the purpose of such a document is to give notice to defendants of the amount sought against them *prior* to the entry of default. (Code Civ. Proc., § 425.11, subd. (c).) Since the complaint did not put Imperial or Glass on notice of the damages sought, Downey Land would not be able to obtain a default judgment against these defendants. Thus, it would be inappropriate to set aside only the default judgment.

The trial court did not err in setting aside the defaults and the default judgment.[8]

---

**8** In light of this conclusion, we need not address other issues raised including whether or not the relief motion was timely pursuant to Code of Civil Procedure section 473. Further, it would be inappropriate to direct the trial court to strike the answers filed by Imperial and Glass.

## DISPOSITION

The petition for writ of mandate is denied. Downey Land is to pay all costs of this proceeding.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.